

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-4151

76-4153

B
Pls

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, et al.

Petitioners

v.

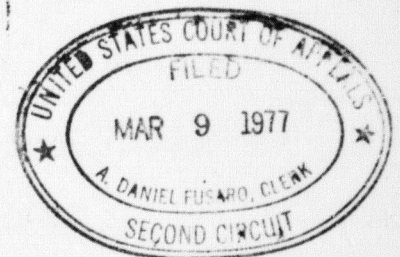
FEDERAL POWER COMMISSION,

Respondent

POWER AUTHORITY OF THE STATE OF NEW YORK

Intervenor

BRIEF OF PETITIONERS
GREENE COUNTY PLANNING
BOARD AND TOWN OF
GREENVILLE ON REHEARING
EN BANC



March 7, 1977

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COURT OF APPEALS FOR
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Power Authority of the
State of New York et ano.

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BRIEF OF PETITIONERS
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GREENVILLE ON REHEARING
EN BANC

This brief is submitted to this Court en banc on behalf of Petitioners Greene County Planning Board and Town of Greenville (collectively hereafter "Greene County")

(1) in support of the December 8, 1976 decision of this Court holding that the Federal Power Commission ("FPC") has the authority in appropriate circumstances to grant reimbursement of intervenors' litigation expenses in proceedings before it, and

(2) in opposition to that portion of the December 8 decision which remanded to the FPC for further consideration only the reimbursement request of the "Durham petitioners" and which

1977. Granting rehearing en banc limited to the question
failed to remand the identical reimbursement request, made in
substantially similar circumstances, of Greene County.

I
THE FPC HAS THE AUTHORITY TO
REIMBURSE INTERVENORS FOR
THEIR LITIGATION EXPENSES
IN PROCEEDINGS BEFORE IT

Greene County joins in the brief of Petitioners Town
of Durham and Association for the Preservation of Durham Valley
("Durham petitioners") on this rehearing en banc. That brief
amply shows that this Court was correct in its December 8 decision
holding that the FPC had adequate legal

"authorization for reimbursement
of indigent intervenors who make
important contributions in
[FPC public] hearings..."
(Slip op. 827).

II
GREENE COUNTY WAS
ERRONEOUSLY OVERLOOKED
IN THE REMAND TO THE
FPC OF THE REIMBURSEMENT
REQUEST SINCE IT PLAYED
THE SAME ROLE IN THE
FPC PROCEEDINGS AS DID
THE DURHAM PETITIONERS

In its discussion of the reimbursement issue (Slip op.
826-829), the December 8 decision did not refer to Greene County.
This is perhaps an inadvertant omission occuring because Greene
County did not separately brief the issue but instead joined in
the main brief of the Durham petitioners (see footnote on p.7 of

Greene County's main brief). The Court may have overlooked the facts that (1) Greene County too was raising the reimbursement issue and (2) Greene County played the same "essential role in the proceedings" (slip op. 828) as did the Durham petitioners and in virtually the same impecunious circumstances.

If there is to be a remand to the FPC

"for reconsideration of its holdings
in light of the Comptroller General's
recent decisions." (slip op. 829),

then the reimbursement request of Greene County ought to receive the same treatment by this Court as afforded to the identical request of the Durham petitioners.

A. Greene County Has Consistently Requested Reimbursement

From the very first prehearing conference in June 1971 before the FPC (Tr. 22, 49)* to its main brief before this Court in September 1976 (p.7), Greene County has pressed its request for reimbursement of litigation expenses. (See, e.g., R. 5982-5987, 6013-6015).

The FPC decision which was brought to this Court for review specifically denied Greene County's request (A. 20-21). Greene County specifically asked the FPC for a rehearing on this

*The prefix "Tr." makes a reference to the hearing transcript which takes up the first 4047 pages of the Record. References to the Record, other than the hearing transcript, are prefixed by an "R.". The prefix "A" marks a reference to those portions of the Record contained in the Deferred Joint Appendix.

issue (A. 104). The FPC denied this rehearing (A. 115-116). Greene County's petition for review in this Court asked for review of every issue on which it was finally denied relief by the FPC.

There can be no question that Greene County properly preserved for review in this Court the FPC's refusal even to listen to Greene County's request for reimbursement of its litigation expenses.

B. Greene County Played A Key Role In The FPC Proceedings Without Which The FPC Could Not Have Made The Decision It Did

The FPC staff and the applicant fought virtually every idea, offer of proof and argument presented by Greene County in the FPC administrative proceeding. There are four Greene County cases in this Court to illustrate that. It thus is pretty clear that had Greene County not done what it did in the FPC proceedings, neither the FPC staff nor the applicant would have provided adequate substitutes for Greene County's participation.

Without Greene County, the routing eventually selected by the FPC would not even have been considered. The applicant Power Authority of the State of New York told this Court in its main brief (p.51)

"The Director of the Greene
County Planning Board...
had a great deal to do
with laying out Route B-1..."

Without Greene County, the need for the transmission line would never even have been explored in the FPC proceeding.

Without Greene County, the FPC staff would never have prepared an environmental impact statement subject to the full scrutiny of the hearing process.

Without Greene County, the expertise of the New York State Public Service Commission and Department of Environmental Conservation would never have been brought to the attention of the FPC, and the Initial Decision would not have been able to rely on such (A. 22-23).

Without Greene County, the FPC would have approved a 400 foot right of way with two parallel sets of towers instead of a more limited 250 foot right of way restricted to a single convertible row of towers.

Without Greene County, the FPC would not have insured that the transmission line be built to accomodate, without additional material change and damage, several new power plants included in the overall comprehensive electrical plan for the region.

Without Greene County, which conducted a test using weather balloons, no visual analysis of the right of way would have been available to the FPC in a case where visual impact was the primary environmental issue.

The Record as a whole quite clearly shows that Greene County and the Durham petitioners acted jointly and cooperatively throughout

this case.* They were the only intervenors in the FPC proceeding to be represented daily at the long hearing. The shape, scope, direction and outcome of the FPC proceeding was primarily a product of their joint efforts (with the help of this Court) -- over the stubborn resistance of the FPC, the administrative law judge, the FPC staff and the applicant.

If there ever was a participant in an administrative proceeding whose participation was essential to the outcome, it was Greene County. At the very least, Greene County ought to be given the same opportunity afforded to the Durham petitioners to marshal before the FPC the evidence showing the essential nature of its participation and the unreasonably large litigation obligations in comparison to its financial resources.

CONCLUSION

This Court en banc should reaffirm the December 8 decision that the FPC has legal authority to award litigation expenses to deserving intervenors. The reimbursement requests of both Greene

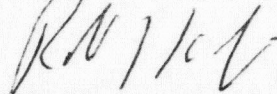
*The main brief of the Durham petitioners repeatedly acknowledged (p. 20, 21, 25) Greene County's contribution:

"There can be no doubt whatsoever that but for the active participation at the hearing by the Durham petitioners and The [Greene County] Planning Board The Gilboa-Leeds line would have been located along Route A-1".
[Emphasis supplied] (Durham petitioners main brief p. 25)

County and the Durham petitioners should be remanded to the FPC
for reconsideration in view of such reaffirmation.

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Respectfully submitted,



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